

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1526

Cir. Ct. No. 2014CV4080

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

COMMONWEALTH ASSISTED LIVING, LLC,

PLAINTIFF-APPELLANT,

V.

3M RESIDENT MONITORING, INC., F/K/A HOMEFREE, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
STEPHANIE ROTHSTEIN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRENNAN, P.J. Commonwealth Assisted Living, LLC, (Commonwealth) appeals an order dismissing all three of its claims against 3M Resident Monitoring, Inc. (3M RM). Commonwealth contends that 3M RM

directly, or impliedly, contracted for lifetime service for the monitoring equipment that Commonwealth purchased from 3M RM. Commonwealth argues that when 3M RM subsequently exited the business, leaving Commonwealth without software upgrades and technical support, 3M RM became liable to Commonwealth for breach of contract, breach of the duty of good faith and fair dealing, and violation of WIS. STAT. § 100.18 (2015-16).¹ The circuit court disagreed and dismissed all of Commonwealth's claims on summary judgment.

¶2 Commonwealth contracted to purchase seven resident monitoring systems²—equipment and software installed in assisted living facilities to allow residents to summon emergency help—between 2009 and 2012 at a total cost of approximately \$250,000.00. Commonwealth purchased the first six from the seller while it was known as HomeFree, Inc. When Commonwealth decided to purchase a seventh system in March 2012, HomeFree had a new parent company and had been renamed 3M Resident Monitoring, Inc. 3M RM submitted a sales proposal for the seventh system in early 2012 that said 3M RM had “the full support” of its parent company, would “be in business for the long term,” and could be “count[ed] on” for product support.

¶3 Commonwealth purchased the seventh system from 3M RM in March, 2012. In September 2012, six months later, 3M RM's parent company

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² An on-call resident monitoring system is designed to give residents a way to summon emergency help from facility staff. Such a system “is comprised of signaling devices installed throughout the facility and a centralized nurse's station where facility staff can monitor calls for help.” The systems operate on proprietary software, and the manufacturer is the sole source of the necessary technical support and upgrades for the system.

made the final decision for 3M RM to cease operations effective December 31, 2013. Commonwealth, which is required by law to have such systems in place in its facilities, replaced all seven systems. Commonwealth then brought this action, asserting common law and statutory claims related to 3M RM's discontinued support for the systems. The circuit court granted summary judgment to 3M RM on all claims.

¶4 We conclude that the circuit court properly granted summary judgment to 3M RM on Commonwealth's breach of contract claims related to each purchase. It is not disputed that Commonwealth chose not to enter service contracts for the systems, and absent a separate service contract, nothing in the terms of the seven purchase contracts themselves obligates 3M RM to provide technical support beyond the one-year warranty. *See Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141 (in a breach of contract claim, the question is "whether a party has violated [contract's] terms" and "whether any such violation is material").

¶5 We also affirm the circuit court's grant of summary judgment to 3M RM on Commonwealth's claim that 3M RM violated its implied duty of good faith and fair dealing as to all seven contracts. Commonwealth argues that the way 3M RM ceased its operations—without prompt information on alternatives and without providing another company the computer code necessary to fix or patch future software security problems—violated its duty of good faith and fair dealing because it deprived Commonwealth of necessary technical support for its systems and prevented Commonwealth from "salvaging any value" from the systems by switching to a different provider. We conclude that 3M RM was properly granted summary judgment on these claims because there were no contracts for technical support and software updates to which the good faith and

fair dealing duty would apply. *See Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 2011 WI 41, ¶52, 334 Wis. 2d 23, 798 N.W.2d 467 (no duty to act in good faith in the absence of a contract).

¶6 We reverse the grant of summary judgment, however, on Commonwealth’s last claim, which is brought under WIS. STAT. § 100.18, Wisconsin’s Deceptive Trade Practices Act, and is based on representations in 3M RM’s sales proposal for the seventh system to the effect that customers could count on product support from the company because it would “be in business for the long term[.]” To prevail on such a claim, a plaintiff must establish three things about a representation made by the defendant: that it was made to “the public” “with the intent to induce an obligation”; that it was “untrue, deceptive or misleading”; and that it caused a “pecuniary loss.” *See K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶19, 301 Wis. 2d 109, 732 N.W.2d 792 (citation omitted). We conclude that 3M RM is not entitled to judgment as a matter of law on this claim because a jury could reasonably find for the non-moving party on each element.³ We therefore reverse the grant of summary judgment as to the § 100.18 claim and remand for further proceedings.

BACKGROUND

¶7 Based on the circuit court’s findings of fact and undisputed facts in the record, we start with the following timeline of this case:

³ The circuit court disposed of this claim on the grounds that Commonwealth was not a member of the public for purposes of § 100.18: “Because Commonwealth was not a member of the public under Section 100.18 when it entered into Contract 7, the Court grants 3M RM’s motion for summary judgment[.]”

- **November 2009 through May 2011:** Commonwealth contracted with HomeFree to purchase resident monitoring systems for six of the twenty-one assisted living facilities it manages in Virginia. After its initial purchase in 2009, Commonwealth did not investigate other vendors. HomeFree delivered the six systems; each had a warranty period of one year. Each of the six purchase contracts contained the following statement in Section 9 of the “Terms of Offer Agreement”:

Customer Support. HomeFree provides software updates to the system at no charge. HomeFree provides unlimited technical support 24 hours per day, seven days per week by telephone at no charge during the warranty period. On-site technical support is available at a cost to customer. Service contracts will be offered after the warranty period is over.

Commonwealth did not enter into a service contract for any of the systems it purchased from HomeFree. For the necessary technical support of the resident monitoring systems, Commonwealth instead opted to pay for such service from HomeFree on a “time and materials” basis.

- **October 1, 2011:** HomeFree was renamed “3M Resident Monitoring.” The new identity was a result of the fact that HomeFree’s parent company was acquired by 3M. When 3M acquires a company, it conducts a market assessment in which it considers every option for the company, from fully resourcing it to fully exiting the business. It conducted such an assessment of HomeFree in February 2011. Following this assessment, 3M allocated resources to HomeFree and later to 3M RM.

- **Early 2012:** 3M RM sent a cover letter⁴ as part of a sales proposal to Commonwealth for the purchase of a residential monitoring system for one of Commonwealth's facilities. The proposal described 3M RM's ability to design a wireless emergency call system with features such as the ability to "provide[] staff with actual resident identification and location," the ability to generate comprehensive reports for management purposes, automated self-testing, and "future expandability." The letter included the following language:

3M Resident Monitoring further enjoys the full support of its parent company, 3M. 3M is a recognized leader in research and development, and produces thousands of innovative products for dozens of diverse markets. 3M's core strength is applying its more than 40 distinct technology platforms -- often in combination -- to a wide variety of customer needs. With \$23 billion in sales, 3M employs 75,000 people worldwide and has operations in more than 65 countries. This information demonstrates that 3M Resident Monitoring will be in business for the long term and you can count on us to be there to support our products, all important factors to consider when looking to partner with a resident monitoring provider.

- **March 2012:** Commonwealth entered into a new purchase contract with 3M RM for a resident monitoring system. The "Terms of Offer Agreement" for the purchase included the following language relevant to technical support:

9. Customer support - 3M Resident Monitoring provides technical support 24/7/365 via phone and/or remote dial in through one of the Service Plans offered by 3M Resident Monitoring.... Please review separate Service Plan options presented by 3M Resident Monitoring and notify 3M

⁴ The cover letter is undated. The sender is 3M RM sales representative Mary Knecht. There are three related documents in the record: a price quotation for equipment from Knecht dated January 27, 2012; a price quotation for installation from Knecht dated February 6, 2012; and the "Terms of Offer Agreement," signed by a Commonwealth employee and dated March 19, 2012. We also note that Commonwealth's brief describes the letter as being written in "early 2012," and 3M RM does not dispute that.

Resident Monitoring which plan you wish to enroll in. Customers not enrolled in one of the offered Service Plans will be billed on a time and materials basis for any and all support services

Commonwealth did not enter into a service contract for this equipment. For the necessary technical support of the resident monitoring system, Commonwealth instead opted to pay 3M RM on a “time and materials” basis.

- **June 2012:** 3M, the parent company of 3M RM, made the preliminary decision to exit the resident monitoring business.

- **September 2012:** 3M made the final decision to exit the resident monitoring business effective December 31, 2013.

- **October 2012:** Commonwealth received written notice of the decision.

- **May 2013:** Commonwealth was notified that after December 31, 2013, resident monitoring systems purchased from 3M RM would “no longer operate properly in the absence of qualified maintenance and support.”⁵

- **August 2013:** Commonwealth replaced its seven resident monitoring systems at a cost of approximately \$412,000.00

⁵ The record reflects that limited telephone technical support was available from 3M RM through June 2014. An alternate technical support provider was identified for 3M RM customers in late 2013, but Commonwealth discovered that the alternate provider had no access to 3M RM’s source code and expressly disclaimed the ability to fix future software security issues. The circuit court’s grant of summary judgment to 3M RM was not based on any assertion that Commonwealth could have located support elsewhere. There is no circuit court finding that Commonwealth had other options for continuing to operate the systems for the length of time it would have expected when it purchased them. The record includes a letter from 3M RM to Commonwealth indicating that once 3M RM’s stock of replacement parts for its systems “has been depleted,” the company “will not be manufacturing additional quantities.”

- **December 2013:** 3M RM ceased all technical support of its products and exited the resident monitoring business.

¶8 Commonwealth filed this action, alleging that “3M [RM]’s December 31, 2013 exit of the on-call resident monitoring business” constituted a breach of each of the seven purchase contracts. As to each contract, Commonwealth also alleged that “3M [RM]’s decision to exit the on-call resident monitoring business unfairly deprived Commonwealth of its right to receive the full benefit of the contract” and thus constituted a breach of the duty of good faith and fair dealing. The final remaining count, alleging violation of WIS. STAT. § 100.18, relates solely to the 2012 contract.⁶

DISCUSSION

Standard of review.

¶9 In this case we review a grant of summary judgment. A party is entitled to summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08. An appellate court is “required to apply the standards set forth in the statute just as the trial court applied those standards.” *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Where a valid claim for relief exists, “we examine the record to determine whether there ‘exist[s] disputed material facts, or

⁶ Commonwealth initially alleged WIS. STAT. §100.18 claims as to each of the seven contracts. The circuit court dismissed with prejudice the §100.18 claims as to the first six contracts. Commonwealth has not appealed that dismissal.

undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.”” *Trinity Evangelical Lutheran Church and School–Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶32, 261 Wis. 2d 333, 661 N.W.2d 789 (citation omitted). “The burden is on the moving party to prove that there are no genuine issues of material fact.” *Central Corp. v. Research Prods. Corp.*, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178. “An issue of fact is genuine if a reasonable jury could find for the nonmoving party.” *Id.* If there is any reasonable doubt regarding whether there exists a genuine issue of material fact, that doubt must be resolved in favor of the nonmoving party. *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶24, 305 Wis. 2d 538, 742 N.W.2d 294.

I. 3M RM is entitled to judgment as a matter of law on the seven breach of contract claims because the contract terms do not create an open-ended obligation to support the software.

¶10 Commonwealth argues that a reasonable jury could find that when 3M RM ceased operations on December 31, 2013, it breached the seven purchase contracts with Commonwealth because the contract language implied that the promise of support “was intended to extend for the useful life of the product.” We look first at the contract terms on which Commonwealth bases its argument.

A. The terms of the 2009-2011 contracts.

¶11 The six contracts entered into between 2009 and 2011 contain the following statement in Section 9 of the “Terms of Offer Agreement”:

Customer Support. HomeFree provides software updates to the system at no charge. HomeFree provides unlimited technical support 24 hours per day, seven days per week by telephone at no charge during the warranty period. On-site technical support is available at a cost to customer. Service contracts will be offered after the warranty period is over.

B. The terms of the 2012 contract.

¶12 In the 2012 contract, the service contract provision was modified, with more detailed language linking the offer of ongoing technological support to those customers who elected to purchase service contracts:

9. Customer support - 3M Resident Monitoring provides technical support 24/7/365 via phone and/or remote dial in through one of the Service Plans offered by 3M Resident Monitoring.... Please review separate Service Plan options presented by 3M Resident Monitoring and notify 3M Resident Monitoring which plan you wish to enroll in. Customers not enrolled in one of the offered Service Plans will be billed on a time and materials basis for any and all support services including, but not limited to: over-the phone technical support; remote software updates; database backup; storage and disaster recovery; and remote and onsite and equipment service.

C. Relevant law.

¶13 The interpretation of a written contract is a question of law that we review *de novo*. ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979). Although we review questions of law independently, we benefit from the circuit court’s analysis. ***Northern States Power Co. v. National Gas Co., Inc.***, 2000 WI App 30, ¶7, 232 Wis. 2d 541, 606 N.W.2d 613 (1999). “[T]he cornerstone of contract construction is to ascertain the true intentions of the parties as expressed by the contractual language.” ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990). We “determine what the parties contracted to do as evidenced by the language they saw fit to use.” *See id.* “When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.” ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. “Contractual provisions must be interpreted within the context of the contract as a whole.” ***MS Real Estate***

Holdings, LLC v. Donald P. Fox Family Trust, 2015 WI 49, ¶43, 362 Wis. 2d 258, 864 N.W.2d 83.

¶14 “Wisconsin courts do not favor perpetual contracts” and are “reluctant to find a perpetual contractual right unless the contract language evidences that the parties clearly intended the contract to be perpetual.” *Id.*, ¶¶31, 45.

D. Commonwealth’s arguments.

¶15 Commonwealth contends that the contracts’ language constitutes an express promise to provide support and that “the absence of an explicit temporal limit on 3M RM’s express promise to provide support does not mean that the promise does not exist[.]” It further argues that our supreme court has held that a court will sustain even a perpetual contract where “the contract language indicates that [the parties] intend the contract to be continual[.]” *See id.*, ¶45.

¶16 The analysis requires us to examine the two provisions.

¶17 With regard to the six pre-2012 contracts, the language Commonwealth relies on is in two sentences found in a four-sentence section on “Customer Support”: “HomeFree *provides software updates* to the system at no charge” and “[o]n-site *technical support is available* at a cost to customer.” (Emphasis added.) The crux of Commonwealth’s argument is that the purchase contract was for an integrated system that is useless without software updates and support. It argues that absent a contractual term that *limits* the “provi[sion] [of] software updates ... at no charge” and the availability of technical support, those obligations extended to cover the useful life of the systems, and that 3M RM’s exit from the business was a breach of the contract.

¶18 Commonwealth’s interpretation of these sentences would require us to read into this section, by implication, the words “for the useful life of the product” even though the length of the obligation is unspecified. For this proposition, it relies on *MS Real Estate Holdings*. But Commonwealth’s reliance on *MS Real Estate Holdings* is misplaced, first, because the contract there was very different from the one here. The contract in *MS Real Estate Holdings* was for a right of first refusal on the purchase of real estate which is by its nature an open time-frame right; as the court explained, “[b]y their nature, right of first refusal contracts often contemplate a level of uncertainty because such contracts rely on triggering events—usually a landowner’s decision to sell—which may or may not occur.” *Id.*, ¶30. The contracts here, by contrast, are for the purchase of a product at the time of the contract. Further, while *MS Real Estate Holdings* does recognize that a perpetual contract need not be expressed with any magic words in the contract, nonetheless it holds that the contract language must clearly express the parties’ intention that the contract be perpetual. *Id.*, ¶45.

¶19 Here, unlike the example of *MS Real Estate Holdings*, there is no language elsewhere in the contract that could indicate that the parties intended to be bound for the useful life of the product. On the contrary, the two sentences Commonwealth relies on appear in a four-sentence paragraph that includes *express limitations*. The third sentence states, “HomeFree provides unlimited technical support 24 hours per day, seven days per week by telephone at no charge *during the warranty period.*” (Emphasis added.) And the fourth states, “Service contracts will be offered *after the warranty period is over.*” (Emphasis added.) It is apparent that one of these statements contains an express temporal limitation: technical support is limited to the warranty period. The other imposes a different kind of express limitation: it makes clear that some *other* form of arrangement

must be made for post-warranty period support. Further, the language appears in the context of information about a warranty period and service contracts. In context, the statements about “provid[ing] software updates” and technical support being available are explanations about how the warranty works—not open-ended, free-standing promises of technical support. *See id.*, ¶43. Because we conclude that the contract language is clear and unambiguous, and that the parties did not intend a perpetual contract for software updates and technical support—other than in a separate service contract—for the first six contracts, we affirm the grant of summary judgment.

¶20 There is even less room for misunderstanding the applicable provision in the seventh contract.⁷ It specifically spells out the two options for technical support: either “through one of the Service Plans offered by 3M Resident Monitoring” or through “bill[ing] on a time and materials basis for any and all support services[.]” It addresses 3M RM’s obligations for technical support and software updates even more unequivocally under the separate transactions outside of the purchase contract. There is nothing in such side agreements that obligates 3M RM beyond their length either, and the pay-as-you-go option chosen by Commonwealth by definition constitutes a lesser promise than a service contract. Thus, we affirm the grant of summary judgment as to this count as well.

⁷ Commonwealth does not address the differences between the terms in the 2012 contract and the terms in the 2009-2011 contracts.

II. 3M RM is entitled to summary judgment on the claims of breach of duty of good faith and fair dealing.

A. Principles of law.

¶21 A duty of good faith is implied in every contract, and is a guarantee by each party that he or she “‘will not intentionally and purposely do anything to prevent the other party from carrying out his [or her] part of the agreement or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.’” *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58 (citation omitted, brackets in original). The rule implying this duty “is intended as a guarantee against ‘arbitrary or unreasonable conduct’ by a party.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995) (citation omitted). Behaviors recognized as a lack of good faith are: “‘evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.’” *Id.* at 797 (citation omitted).

¶22 “[T]he ... implied covenant of good faith and fair dealing arises out of the relationship created by the contract.” *Brethorst*, 334 Wis. 2d 23, ¶52. “If there is no contract, the [defendant] has no duty to act in good faith with respect to a claim.” *Id.* The interpretation of a written contract is a question of law that we review *de novo*. *Jones*, 88 Wis. 2d at 722. We “determine what the parties contracted to do as evidenced by the language they saw fit to use.” *Journal/Sentinel, Inc.*, 155 Wis. 2d at 711.

¶23 Whether a party to a contract has breached its implied duty of good faith is a question of fact. *Wisconsin Natural Gas Co. v. Gabe’s Constr. Co.*,

Inc., 220 Wis. 2d 14, 24 n.6, 582 N.W.2d 118 (Ct. App. 1998). A court may decide that no reasonable jury could find such a breach. *Foseid*, 197 Wis. 2d at 798.

¶24 “[A] party may be liable for breach of the implied contractual covenant of good faith even though all the terms of the written agreement may have been fulfilled.” *Wisconsin Natural Gas Co.*, 220 Wis. 2d at 21-22 (citation omitted) (finding as a matter of law that the duty of good faith and fair dealing, in an indemnification agreement context, requires notice to the indemnitor even if the contract does not so specify).

B. The arguments.

¶25 Commonwealth pled a breach of the duty of good faith and fair dealing as to all seven contracts. Neither Commonwealth nor 3M RM distinguishes between the individual contracts in the arguments on this issue. Commonwealth frames its good faith argument as one based not on the *fact* that 3M RM ceased operations but rather on the fact that it did so in a *manner* that deprived Commonwealth of the benefit of its bargain: specifically, it created uncertainty for customers about where they could find technical support, and ultimately it refused to give its proprietary software code to a company that could otherwise have provided a permanent tech support solution to customers with 3M RM systems. Commonwealth argues that the manner in which 3M RM ceased operations had “the effect of destroying or injuring the right of the other party to receive the fruits of the contract,” which is one way a court has defined breaching the duty of good faith. *Metropolitan Ventures, LLC*, 291 Wis. 2d 393, ¶35 (citation omitted).

¶26 3M RM argues that this dispute relates to support and software updates after the warranty periods specified in each of the contracts, and that post-warranty support was explicitly excluded from the purchase agreements and was to be subject to separate agreements. It therefore essentially argues that any good faith claim related to the manner of ceasing that support cannot be grafted onto the purchase agreements, and it cites cases that define the good-faith duty as arising from a specific contract as opposed to a free-floating duty. *See Brethorst*, 334 Wis. 2d 23, ¶52.

¶27 The circuit court agreed with 3M RM that “there was no contract for lifetime provision of services—software updates and support” and concluded as a matter of law that this necessarily meant that Commonwealth could not prevail on the good faith and fair dealing claims based on 3M RM’s manner of cutting off those services. It therefore granted summary judgment on this issue.

¶28 The duty of good faith and fair dealing is grounded in a contract. *Id.* Commonwealth’s claims in this case make clear that the effect on customers from the manner 3M RM ceased operations relates almost exclusively to the loss of ongoing technical support and software updates. As we determined in the breach of contract analysis above, 3M RM is not obligated by the purchase agreements (beyond the year of warranty) to provide continued support. If it is not, there can be no good faith duty associated with the continued provision of technical support and software updates. It is not disputed that Commonwealth entered into no contracts for this support, and absent a contract from which to discern what rights the parties agreed to on this point, we cannot determine that any duty of good faith and fair dealing has been breached.

¶29 For this reason, we conclude that summary judgment is appropriate on these claims.

III. Summary judgment is improper on Commonwealth’s WIS. STAT. § 100.18 claim because a reasonable jury could find for the non-moving party on the elements of that claim.

A. Principles of law.

¶30 WISCONSIN STAT. § 100.18(1) prohibits a corporation from making any “representation or statement of fact which is untrue, deceptive or misleading” with the “intent to induce the public in any manner to enter into any contract or obligation relating to the purchase ... of any ... merchandise ... or service.”

¶31 The statute creates a private right of action against a party who violates it. *See* WIS. STAT. § 100.18(11)(b)2. To prevail on such a claim, the plaintiff must prove three elements. *Tietzworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶39, 270 Wis. 2d 146, 677 N.W.2d 233; WIS JI—CIVIL 2418. First, that with the intent to induce an obligation, the defendant made a representation to “the public[.]” § 100.18(1). Second, that the representation was “untrue, deceptive or misleading.” *Id.* Third, that the representation caused the plaintiff a pecuniary loss. § 100.18(11)(b)2. ““Although the representation need not be the sole or only motivation for [the] decision to buy the [item in question], it must have been a material inducement. That is, the representation must have been a significant factor contributing to [plaintiff’s] decision.”” *K & S Tool & Die Corp.*, 301 Wis. 2d 109, ¶37 (quoting WIS JI—CIVIL 2418).

¶32 Courts have interpreted what constitutes representations made to the public broadly, finding that the legislature “intended to protect the residents of Wisconsin from *any* untrue, deceptive or misleading representations made to

promote the sale of a product.” *State v. Automatic Merchandisers of Am., Inc.*, 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974) (emphasis added). The Wisconsin Supreme Court in *Automatic Merchandisers* for the first time determined, as a matter of law, that the members of the public, for purposes of WIS. STAT. § 100.18, included potential customers to whom the seller made oral representations in a private conversation. *Id.* at 663-64. It construed the legislature’s intent to include more than mass printed advertising. *Id.* at 664.

¶33 “Based on the existing interpretations of ‘the public,’ a plaintiff remains a member of ‘the public’ unless a particular relationship exists between him or her and the defendant.” *K & S Tool & Die Corp.*, 301 Wis. 2d 109, ¶27. “The existence of a particular relationship ‘will depend upon its own peculiar facts and circumstances and must be tested by the statute in the light of such facts and circumstances.’” *Id.* (citation omitted).

¶34 WISCONSIN STAT. § 100.18 claims are, however, “limited to statements made prior to the acceptance of the offer to purchase” because a plaintiff is no longer a member of “the public” for the purpose of WIS. STAT. § 100.18(1) once he or she has entered into a contract to purchase the offered item. *Kailin v. Armstrong*, 2002 WI App 70, ¶44, 252 Wis. 2d 676, 643 N.W.2d 132. That is because the purpose of §100.18 is aimed at untrue, deceptive, or misleading statements made to *induce* certain actions. *Id.*

¶35 The jury instruction for the third element, that the misrepresentation caused the plaintiff’s pecuniary loss, is as follows:

Third, (plaintiff) sustained a monetary loss as a result of the (assertion) (representation) (statement). In determining whether (plaintiff)’s loss was caused by the (assertion) (representation) (statement), *the test is whether (plaintiff) would have acted in its absence.* Although *the (assertion)*

(representation) (statement) need not be the sole or only motivation for (plaintiff) 's decision to (buy) (rent) (use) the _____ [product or item], it must have been a material inducement. That is, the (assertion) (representation) (statement) must have been a significant factor contributing to (plaintiff) 's decision.

Novell v. Migliaccio, 2008 WI 44, ¶49 n.3, 309 Wis. 2d 132, 749 N.W.2d 544 (quoting WIS JI—CIVIL 2418) (emphasis added).

B. Summary judgment is not appropriate because a reasonable jury could find that 3M RM's 2012 statement was a representation to "the public" made with "intent to induce an obligation."

¶36 The circuit court concluded as a matter of law that Commonwealth was not a member of the public for purposes of WIS. STAT. § 100.18 based on its prior purchases from HomeFree and 3M RM and based on the fact that it did not investigate other resident monitoring system vendors after 2009. On this basis, it granted 3M RM's summary judgment motion as to this claim. We conclude that this is contrary to our supreme court's holding in *K & S Tool & Die* that it was a jury question whether a party was a member of "the public" where there was evidence of a prior relationship.

¶37 In *K & S Tool & Die* the defendant had argued that it was entitled as a matter of law to a finding that the plaintiff was not a member of the public for purposes of WIS. STAT. § 100.18. Our supreme court stated the presumption: "a plaintiff remains a member of 'the public' *unless a particular relationship exists* between him or her and the defendant." *K & S Tool & Die Corp.*, 301 Wis. 2d 109, ¶27 (emphasis added). It upheld the trial court's decision to submit the question to the jury because there were factual disputes in *K & S Tool & Die*, which we do not have here. Setting forth the competing inferences to be drawn

from the evidence, which included prior purchases between the two parties and an agreement for defendant to help plaintiff locate a piece of equipment:

[I]n this case, whether K & S was a member of “the public” presented a question of fact. Based on the evidence, a reasonable jury could have made conflicting inferences or found in either party’s favor. The circuit court did not err in denying Perfection’s motions pertaining to K & S’s status as a member of “the public.”

On one hand, the jury could have reasonably found that a particular relationship existed between Perfection and K & S. The jury heard evidence that K & S had purchased a [machine] from Perfection in the past. It heard that ... an owner of K & S[] and ... a Perfection sales representative[] entered into an agreement for Perfection to find K & S a suitable press, after the parties agreed that a suitable press was not in Perfection’s inventory. If a jury inferred from these facts that a particular relationship existed between Perfection and K & S, it could have reasonably concluded that K & S was not a member of “the public” when it received the [price] quotation that contained the misrepresentation.

On the other hand, a jury could reasonably find that K & S was a member of “the public” when Perfection faxed the quotation, as the jury did in this case. Evidence supporting this finding includes that Perfection held itself out as having “the country’s largest inventory of used late model presses, fabricating & metalworking equipment,” according to its quotation. Given the nature of Perfection’s business as an industry leader, the jury could reasonably infer that K & S contacting Perfection for a used press would not be a sufficient fact to create a particular relationship. Additionally, K & S bought the roll former from Perfection back in 1996, but had purchased nothing else either before or after that purchase. The purchase could be construed as too isolated to establish a particular relationship.

K&S Tool & Die Corp., 301 Wis. 2d 109, ¶¶30-32.

¶38 The parallels to the facts of this case are apparent. A jury could reasonably infer from the fact of Commonwealth’s repeated purchases and

decision not to investigate other vendors that it was *not* a member of the public for purposes of WIS. STAT. § 100.18. On the other hand, a reasonable jury could infer from the fact that Commonwealth had no obligation to make any further purchases from 3M RM and the fact that 3M RM sent a sales proposal to Commonwealth for the 2012 purchase as it might send to any other potential customer that Commonwealth *was* a member of the public for purposes of § 100.18.

¶39 Furthermore, the fact pattern of this case is quite different from the sole instance in which a Wisconsin court found as a matter of law that a party was *not* a member of the public for purposes of WIS. STAT. § 100.18. In that case, the parties were already in a contractual relationship when the allegedly deceptive representation was made as to the purchased item. *See Kailin*, 252 Wis. 2d 676, ¶2 (the statute does not apply to representations made after the acceptance of the offer to purchase because statements made to the other party to a contract are not statements made “to the public”).

C. Summary judgment is not appropriate because a reasonable jury could find for the non-moving party on the third element, the causation of pecuniary loss.

¶40 3M RM argues that the 2012 representation does not satisfy the third element, cause of pecuniary loss, because as a matter of law the representation was not “a material inducement causing the plaintiff’s loss.” *Novell*, 309 Wis. 2d 132, ¶3. The case on which 3M RM relies for this argument, however, was not one in which the causation element was decided as a matter of law. In fact, our supreme court remanded for a jury trial on the question:

[Defendants] maintain that even if reasonable reliance is not an element of a § 100.18 claim, the reasonableness of a person’s actions in relying on representations is a defense and *may be considered by a jury in determining cause*. We agree. As set forth above,

there are three elements in a § 100.18 cause of action: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was “untrue, deceptive or misleading,” and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff. *K & S Tool and Die*, ¶19; *see also* WIS JI—CIVIL 2418. *Reliance is an aspect of the third element, whether a representation caused the plaintiff’s pecuniary loss.*

Id., ¶49 (emphasis added; footnote omitted).

¶41 Further, *Novell* certainly does not stand for the proposition that 3M RM appears to argue: that where multiple factors may have motivated the plaintiff’s purchase, the court may decide as a matter of law that the alleged misrepresentation was not a “significant factor.” In *Novell*, the argument by the defendant was that it was simply unreasonable for the plaintiff to rely on the alleged misrepresentation.⁸ 3M RM’s argument, in contrast, is that there is evidence that other factors—namely a preference to keep using the same system it had in place elsewhere—played a role in Commonwealth’s 2012 purchase decision. But the fact that other factors existed is clearly insufficient to defeat Commonwealth’s claim as a matter of law, and *Novell* does not require otherwise.

¶42 There is ample evidence in the record that the stability of a vendor is a routine consideration for companies purchasing a resident monitoring system. On this record, a reasonable jury could find that the 2012 representation that

⁸ Our supreme court acknowledged that “there are cases in which a circuit court may determine as a matter of law that *a plaintiff’s belief of a defendant’s representation* is unreasonable, and as a result the plaintiff’s reliance is therefore also unreasonable.” *Novell v. Migliaccio*, 2008 WI 44, ¶61, 309 Wis. 2d 132, 749 N.W.2d 544 (emphasis added). “In such cases the circuit court may determine that the representation did not materially induce (cause) the plaintiff’s decision to act as a matter of law[,]” and conclude as a matter of law that the caused-the-pecuniary-loss element of the claim would not be satisfied. *Id.* However, in the case it was deciding, the supreme court unanimously agreed that genuine issues of material fact precluded summary judgment. The issue of the reasonableness of Commonwealth’s belief in 3M RM’s representation was not argued here.

3M RM “will be in business for the long term” was a “significant factor” contributing to Commonwealth’s decision to purchase the system. Therefore, 3M RM is not entitled to summary judgment.

¶43 For these reasons, we reverse the grant of summary judgment and remand for further proceedings on the WIS. STAT. § 100.18 claim. We affirm the grant of summary judgment in all other respects.

By the Court.—Affirmed in part, reversed in part, and cause remanded.

Not recommended for publication in the official reports.

